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**WJB-TV FT. PIERCE LIMITED PARTNERSHIP**

8423 S. US #1  
Port St. Lucie, FL 34985

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JAN 26 1993  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

KENNETH E. HALL  
General Manager

Area Code 407  
Telephone 871-1688  
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January 25, 1993

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VIA FEDERAL EXPRESS

JAN 26 1993

Ms. Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M Street, NW, Room 222  
Washington, DC 20554

FCC - MAIL ROOM

RE: Comments filed in Response to Notice of Proposed  
Rule Making in MM Docket 92-265 (Development of  
Competition and Diversity in Video Programming  
Distribution and Carriage Issues)

Dear Ms. Searcy:

Enclosed for filing are the facsimile Comments of WJB-TV  
Ft. Pierce Limited Partnership which are submitted in response to  
the Notice of Proposed Rulemaking released on December 24, 1992 in  
MM Docket No. 92-265. Nine copies of these Comments will be  
forwarded to you by overnight carrier to complete your files. One  
of these copies is to be provided to each of the Commissioners.

If you have any questions or need additional information,  
please advise.

Very truly yours,

**WJB-TV Limited Partnership**

BY: Kenneth E. Hall

Kenneth E. Hall  
General Manager

KEH/jpd  
Enclosures

cc: Mr. Walter R. Pettiss  
Mr. Robert A. Brannon  
(all with enclosure)

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**

Washington, DC 20554

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JAN 26 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Sections 12 and )  
19 of the Cable Television )  
Protection and Competition Act )  
of 1992 )

Development of Competition and )  
Diversity in Video Programming )  
Distribution and Carriage )

MM Docket No. 92-265

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**COMMENTS OF WJB-TV  
FT. PIERCE LIMITED PARTNERSHIP**

Kenneth E. Hall  
General Manager  
8423 South U.S. #1  
Port St. Lucie, FL 34985  
(407) 871-1688

January 25, 1993

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Before the  
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Washington, DC 20554

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MM Docket No. 92-265

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JAN 26 1993

FCC - MAIL ROOM

**COMMENTS OF WJB-TV FT. PIERCE LIMITED PARTNERSHIP**

1           In its Notice of Proposed Rulemaking ("Notice") in MM  
2 Docket No. 92-265 released December 24, 1992, the Commission  
3 requested comments on a variety of issues relating to the  
4 relationships between video programming distributors and the  
5 vendors of the programming that they distribute. WJB-TV Ft. Pierce  
6 Limited Partnership ("WJB") hereby files its initial comments in  
7 response to the Notice.

8           WJB is the operator of a wireless cable television system  
9 in Ft. Pierce, Florida. Although it has been in operation for less  
10 than a year, the system already has over 3,000 customers. Like  
11 many wireless cable operators, it competes for the majority of its  
12 subscribers with an entrenched cable operator which has served the  
13 area for many years.

14           WJB's experience indicates that in order for an  
15 alternative provider of video services to compete with an

1     entrenched cable system, it must offer substantially all of the  
2     channels of programming that viewers desire to watch; the inability  
3     or failure to provide even a few "key" channels can be harmful to  
4     a competitive effort. This is especially true in the wireless  
5     cable industry, where limited spectrum allocation restricts the  
6     number of channels that can be offered; with fewer available  
7     channels, those that are offered must be the most desirable ones.

8             In most cases, the entrenched cable system and its  
9     competitor desire to carry the same channels. To the extent that  
10    the two systems are able to carry the same programming under the  
11    same terms and conditions, they can compete on a level playing  
12    field. This situation ensures that consumers enjoy all of the  
13    benefits of a competitive market.

14            Unfortunately, the playing field for alternative video  
15    providers is not always level. In many instances, alternative  
16    providers such as WJB are simply refused access to the most  
17    desirable programming. In other cases, the services are offered,  
18    but under prices, terms and conditions that are much less favorable  
19    than those offered to cable companies. There situations  
20    substantially impede the ability of alternative providers such as  
21    WJB to compete in the marketplace and deny consumers the benefits  
22    of this competition. Consequently, the situations outlined above  
23    illustrate the need for Sections 12 and 19 of the Cable Television  
24    Consumer Protection and Competition Act of 1992 (the "1992 Cable  
25    Act") and for this proceeding.

## **I. INTRODUCTION**

The Notice asks for comments on a large number of issues. In the interests of time and space, WJB will limit its initial comments to certain key issues that are the most pressing to its interests. It reserves the right, however, to respond to additional issues, if necessary, in its reply comments.

## **II. PROGRAMMING ACCESS**

Section 19 of the 1992 Cable Act added an important new provision to the Communications Act of 1934, namely, Section 628. This provision, contained in part (b) to the section, provides:

"It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

The Notice asks for comments on a variety of issues regarding this provision. WJB will address in order those matters on which it wishes to comment.

### **A. Congressional Intent**

The Notice first asks for comments regarding a "correct understanding of the Congressional objectives of the new Section." See Paragraph 6 of the Notice. This is a critical issue; understanding the purpose and objective of Section 628 is critical

1 to understanding and interpreting all of the other issues addressed  
2 in the Notice.

3 In this regard, Section 628(a) provides:

4 The purpose of this section is to promote the public  
5 interest, convenience and necessity by increasing  
6 competition and diversity in the multichannel video  
7 programming market, to increase the availability of  
8 satellite cable programming and satellite broadcast  
9 programming to persons in rural and other areas not  
10 currently able to receive such programming, and to spur  
11 the development of communication technologies.  
12

13 The very first articulated purpose of Section 19 is to  
14 promote competition in the video marketplace.<sup>1</sup> Indeed, this is one  
15 of the principal purposes of the 1992 Cable Act. See Section 2(b)  
16 of the 1992 Cable Act. The word "competition" is even included in  
17 the name of the new law, the "Cable Competition and Consumer  
18 Protection Act of 1992." Therefore, in interpreting Section 628,  
19 it is important to bear in mind that one of the overriding  
20 objectives of this section and the 1992 Cable Act in general is to  
21 promote competition.

22 The Notice asserts that common ownership of cable systems  
23 and programming suppliers can produce some limited benefit to the  
24 public, such as by encouraging cable operators to invest in  
25 programmers. See Paragraph 7 of the Notice. However, in WJB's  
26 experience, cable ownership of program vendors has in some cases  
27 resulted in exclusive contracts, discriminatory terms, and other

---

28 <sup>1</sup> The other articulated objectives of Section 628, to "increase  
29 the availability of ... programming to persons in rural areas not  
30 currently able to receive such programming" and to "spur the  
31 development of communication technologies," are both advanced by  
32 wireless cable operators such as WJB.

1 anti-competitive activities. These actions impede the ability of  
2 alternative providers to compete with cable. When desired channels  
3 are only available on one system, customers have no choice but to  
4 procure their video services from that system. Under these  
5 circumstances, realistic competition is severely restricted. This  
6 is clearly inconsistent with Section 628 and the 1992 Cable Act,  
7 which seek to promote competition. Thus, whatever public benefits  
8 may arise from common ownership of cable and programmers, this  
9 situation, if not carefully regulated, may also produce the  
10 undesired result of diminishing competition and consumer choice in  
11 the marketplace.

12  
13 **B. Scope of Section 628**

14 The Notice also asks for comments as to whether the  
15 protections of Section 628 should be limited to those situations in  
16 which a cable operator is "vertically integrated" with the  
17 programmer at issue. A fair reading of Section 628 indicates that  
18 Congress did not limit Section 628 to vertically integrated cable  
19 operators.

20 Section 628(b) clearly states that its prohibitions apply  
21 to three groups, specifically:

- 22 1. cable operators  
23 2. satellite cable programming vendors in which a  
24 cable operator has an attributable interest  
25  
26 3. satellite broadcast programming vendors

27 Clearly, nothing in this section requires a cable  
28 operator to be "vertically integrated" in order to be subject to



1 its coverage. Such a reading is wholly inconsistent with the  
2 Congressional objectives of both Section 628 and the 1992 Cable  
3 Act, including the promotion of competition. Congress intended to  
4 remove all artificial and unnecessary restrictions on competition  
5 in the video marketplace, without regard to whether the offending  
6 conduct resulted from "vertical integration". In this sense, both  
7 vertically-integrated and non-integrated firms should be expected  
8 to function the same (See Paragraph 8 of the Notice); neither  
9 should be allowed to unduly restrict competition in violation of  
10 the clear Congressional objectives of the 1992 Cable Act.

11 The Notice recognizes that Sections 628(c)(2)(A), (B),  
12 (C), and (D) refer to situations in which the cable operator and  
13 the programmer are affiliated. However, these provisions are not  
14 intended to be exhaustive of the conduct prohibited by subsection  
15 (b); they simply provide examples of some of the types of conduct  
16 that are to be covered by regulations. This interpretation is  
17 clear from the title to subsection (c), "Minimum Contents of  
18 Regulations." From the plain language of Subsection (b), it is  
19 apparent that Section 628 is to be read broadly to reach all cable  
20 operators.

21 WJB agrees with the Notice that all "satellite broadcast  
22 programming vendors", regardless of affiliation, were meant to be  
23 included within the coverage of Section 628. Id. As the Notice  
24 states, subsection (b) does not require an "attributable interest"  
25 when referring to those vendors. This same logic applies to cable  
26 operators; as with satellite broadcast programming vendors, nothing

1 in Section 628 requires that cable operators have an "attributable  
2 interest" in any other entity in order for the prohibitions of the  
3 section to apply with full force.

4  
5 **C. Attributable Ownership Interest**

6 The Notice proposes to establish a five-percent threshold  
7 for determining if an entity is vertically integrated. See  
8 Paragraph 9 of the Notice. It then asks whether "an attribution  
9 benchmark by itself [will] be sufficient to determine whether an  
10 entity actually controls another entity, or should the Commission  
11 establish behavioral guidelines to determine control irrespective  
12 of the attribution threshold?" It is on this question that WJB  
13 wishes to comment.

14 WJB believes that Section 628 was intended to reach  
15 "unfair methods of competition" and "unfair or deceptive acts or  
16 practices" by any cable operator or vendor, not just those who  
17 share a certain percentage of ownership. Again, since one of the  
18 primary objectives of both Section 628 and the 1992 Cable Act is to  
19 promote competition, contrary activities by any party should be  
20 prohibited.

21 WJB recognizes that cable companies and vendors that are  
22 jointly owned are the most likely to engage in anti-competitive  
23 activities. It is obvious that these parties will have the  
24 ability, and often the motivation, to engage in activities that  
25 violate Section 628.

1           It is also possible that cable companies, regardless of  
2   their ownership interests, can unduly influence a vendor's  
3   marketing decisions. Congress has recognized that the cable  
4   industry has become highly concentrated. See Section 2(a)(4) of  
5   the 1992 Cable Act. Consequently, a few companies now own a large  
6   percentage of all of the cable systems throughout the country. As  
7   a result, these companies have acquired a large degree of market  
8   power, leverage, and influence, based largely upon their size and  
9   status. Even if these companies do not actually own a vendor, they  
10   may have the power to influence its decisions. For this reason,  
11   any definition of any "attributable interest" should take into  
12   account the amount of influence, leverage, or control that an  
13   operator may possess over a vendor, regardless of its ownership  
14   interests.

15  
16           **D. Prohibited Conduct**

17           The Notice also asks for comments on the types of  
18   practices which are to be prohibited under 628. Unfortunately, it  
19   appears to read Section 628 as applying only to conduct that is  
20   either "unfair", "deceptive" or "discriminatory," and then only  
21   when "the purpose or effect ... is to hinder significantly or to  
22   prevent" the distributor from providing programming to consumers.  
23   WJB disagrees with this interpretation of Section 628.

24           WJB believes that Section 628, by its express language,  
25   applies to two types of conduct, specifically:

- 26           1. "unfair methods of competition"

1           2.    "unfair or deceptive acts or practices, the purpose  
2                   or effect of which is to hinder significantly or to  
3                   prevent any multichannel video programming  
4                   distributor from providing satellite cable  
5                   programming or satellite broadcast programming to  
6                   subscribers or consumers."

7  
8           This interpretation is significant because in the case of  
9   unfair competition, it does not require the showing of any  
10   "purpose" or "effect." If a tactic is unfair and anti-competitive,  
11   it is prohibited. If it is "unfair" or "deceptive" but not anti-  
12   competitive, the additional showing is required. This  
13   interpretation is not only logical, but it is wholly consistent  
14   with the objective of Section 628, that of promoting competition.  
15   If a practice hinders competition, it should be prohibited.

16           WJB is especially concerned about the efforts of "unfair  
17   methods of competition." For instance, it is aware that a local  
18   school board which holds an ITFS license recently issued a Request  
19   for Proposal to interested parties regarding the use of its  
20   channels. The local cable company responded by offering a generous  
21   package that included allowing the School Board to retain exclusive  
22   use of the channels, seven days a week, twenty-four hours per day.  
23   While the cable company may be a generous benefactor to the local  
24   educational community, one cannot ignore the fact that by denying  
25   the use of those channels to a wireless operator, the company can  
26   diffuse its only source of competition in the market.<sup>2</sup> Certainly,

---

27           <sup>2</sup> Admittedly, this practice is probably not permitted under the  
28   regulations and Orders of the Commission pertaining to ITFS usage.  
29   Nevertheless, it is illustrative of the types of activities that  
30   inhibit competition and need to be addressed by the Commission.

1 actions of this type are inconsistent with the policies of the 1992  
2 Cable Act inasmuch as such actions harm competition.

3 The Notice also asks for comment on the "precise showing  
4 of harm" that should be required under this Section. WJB notes  
5 that the statute does not require that harm actually occur;  
6 instead, it refers to conduct which has the "purpose" of hindering  
7 competition, as well as that which has the "effect" of doing so.  
8 Thus, even if no harm arises, conduct which is intended or designed  
9 (i.e., has the "purpose") to hinder competition is prohibited by  
10 the plain language of Section 628. A showing of actual harm is not  
11 required.

12 The Notice also asks whether the prohibited conduct  
13 should be measured by its effect on consumers, competitors, or  
14 both. Clearly, the 1992 Cable Act was designed to protect  
15 consumers. However, logic dictates that there is a fine line  
16 between the interests of consumers and those of competitors; if a  
17 competitor is adversely affected by an action, the result will  
18 likely be higher prices or decreased quality, both of which cause  
19 harm to the consumer. Thus, in analyzing whether an action  
20 adversely affects a consumer, the Commission should focus upon  
21 whether the activity might lead to higher prices charged by a  
22 competitor, decreased quality or quantity of services offered by a  
23 competitor, or a reduction in competition in the marketplace. If  
24 so, the activity is prohibited by Section 628.

25 The Notice also asks for comments as to what factors  
26 should be evaluated to determine whether a price differential

1 "restrains" a video provider from providing programming to  
2 customers. See footnote 26. WJB notes that Section 628(b) does  
3 not actually require a restraint; a showing that an activity  
4 "hinders significantly" a programmer's ability to provide  
5 programming is sufficient.

6  
7 **E. Promulgation of Regulation Under Section 628**

8 Section 628(c)(1) directs the Commission to promulgate  
9 regulations for the purpose of "increasing competition and  
10 diversity in the multichannel video market and the continuing  
11 development of communications technologies." Section 628(c)(2)  
12 then provides several obvious examples of the types of activities  
13 that Congress intended to curtail.

14 The Notice asks whether Congress intended for the  
15 Commission to regulate any activities beyond those specifically  
16 identified in Section 628(c). See footnote 32 to the Notice. The  
17 answer is yes. First, Section 628(c)(2) is entitled "Minimum  
18 Contents of Regulations"; the use of the word "minimum" indicates  
19 that the examples provided were not intended by Congress to be an  
20 exhaustive listing. Furthermore, the language of Section 628(b)  
21 specifically makes references to "cable operators" and "unfair  
22 methods of competition", clearly covering conduct beyond those  
23 cited as examples in Section 628(c).

24 The Notice also asks for guidance in enacting regulations  
25 as to the specific conduct identified in Section 628(c)(2). See  
26 Paragraph 13 to the Notice. Again, emphasizing that those

1 regulations are not exhaustive of the types of conduct prohibited  
2 by Section 628, WJB submits the following comments.

3  
4 **1. Undue Influence**

5 Section 628(c)(2)(A) requires the Commission to issue  
6 regulations that would prohibit cable operators from "unduly or  
7 improperly influencing" the decisions of an affiliated vendor to  
8 sell to an unaffiliated distributor. The Notice requests comment  
9 on the definition of "undue influence" and on how to distinguish "a  
10 cable operator's influence from a program vendor's independent  
11 conduct." See Paragraph 14 of the Notice.

12 WJB believes that program vendors are rational business  
13 people who, in a free and competitive market, would seek to  
14 increase their sales volumes and maximize their profits whenever  
15 possible. Assuming that an affiliated and an unaffiliated  
16 programmer are alike in all other respects (i.e., creditworthiness,  
17 system size, geographic location, etc.), there is no reason that a  
18 vendor should or would discriminate between them. Even where minor  
19 differences in the purchasers exist and such differences affect the  
20 cost or risk of the transaction to the vendor, any price  
21 differential should be reasonable and explainable. In  
22 circumstances where this is not the case, an inference of improper  
23 influence should arise.

24 The burden of demonstrating improper influence should not  
25 be placed on the unaffiliated distributor. The distributor,  
26 because he is unaffiliated, will not generally know the alleged

1 justification for the differential; at best, all that he will know  
2 is that he is being charged a price higher than that charged to his  
3 competition. Once he demonstrates that a differential exists (or  
4 reasonable grounds for believing that a differential exists), the  
5 burden should shift to the vendor to demonstrate that no "undue  
6 influence" exists. Again, the vendor is the only party that will  
7 be privy to that information.

## 8 9 **2. Discrimination**

10 The same problem exists under the "discrimination,"  
11 standard in Section 628(c)(2)(B), for which the Notice also  
12 solicits comments. An unaffiliated distributor simply will not  
13 know the alleged justification for any differential, much less  
14 whether "discrimination" exists. It is therefore impossible for it  
15 to make a prima facie case and unfair for it to be required to do  
16 so. See Paragraph 16 of the Notice. Instead, the distributor  
17 should only be required to demonstrate that a differential exists  
18 (or reasonable grounds for so believing); the burden of justifying  
19 the differential should rest with the vendor, presumably the only  
20 party that can explain the rationale for the differential.

21 The Notice proposes a two-step evaluation for evaluating  
22 such claims, first focusing on whether the conduct is  
23 "discriminatory" and then assessing whether it has "prevented or  
24 hindered" competition. See Paragraph 16 of the Notice. Again, WJB  
25 asserts that the second step, the requirement of actual harm, is  
26 not required by the statute; Section 628(b) only requires that the



1 conduct have either the "purpose" or the "effect" of hindering  
2 competition. If a discriminatory purpose is present, the actual  
3 result is irrelevant.

4 Section 628 does allow vendors to maintain price  
5 differentials for certain specified legitimate reasons. The Notice  
6 seeks comment on this provision. See Paragraph 17 of the Notice.

7 WJB agrees that volume discounts, actual cost savings in  
8 distribution and other legitimate and identifiable factors should  
9 justify modest price differentials. However, WJB is concerned as  
10 to how these factors might be interpreted by vendors, and thus  
11 urges the Commission to carefully monitor this issue. For example,  
12 might a vendor consider a cable operator more "creditworthy" than  
13 a competitor merely because it has been in operation for a longer  
14 period of time? If so, then this Section may be of little utility  
15 to alternative video providers and to the objective of promoting  
16 competition in the marketplace.

17 The Notice also asks whether the Commission can allow  
18 discriminatory practices on the grounds that non-affiliated  
19 programmers engage in the same practices. See Paragraph 25 of the  
20 Notice. WJB vehemently disagrees with this proposal. First, WJB  
21 does not believe that subsection (b) permits non-affiliated  
22 entities to engage in unfair and discriminatory practices. In any  
23 event, one of the primary purposes of Section 628 is to promote  
24 competition. To allow one entity to undercut this objective merely  
25 because another entity also does it is completely inconsistent with  
26 this objective.

1           The Notice tentatively concludes that this regulation  
2   should not be applied retroactively to existing contracts. See  
3   Paragraph 27 of the Notice. Again, WJB disagrees with this  
4   approach. Understandably, the Commission is reluctant to interfere  
5   with existing contracts. As the Notice states, however, a  
6   prospective approach "may not achieve the results Congress  
7   envisioned from the requirements of Section 628 in a timely fashion  
8   given the long-term nature of many programming agreements."

9           The problem with a prospective approach is that most  
10   contracts will not be covered. Alternative providers such as WJB  
11   have invested millions of dollars into systems that finally provide  
12   consumers with the benefits of competition. Many of these  
13   investments were actually encouraged by Commission policies that  
14   expressed a desire to promote new technologies. For these  
15   investments to succeed, the enforcement of these regulations must  
16   begin immediately. To deny these investors, as well as the  
17   consuming public, with the immediate benefit of these regulations  
18   will be tantamount to denying the benefits of competition and to  
19   abandoning the encouragement of new technology.

20           WJB recommends that vendors be allowed to honor contracts  
21   that are in compliance with Section 628. Presumably, this will  
22   include most existing agreements, including those entered into with  
23   cable companies. However, contracts that violate the new law -  
24   such as by discriminating or impeding competition - should be  
25   deemed as violative of public policy and subjected to re-

1 negotiation on the same terms and conditions as those contracts  
2 that do comply with Section 628.

3  
4 **3. Exclusive Contracts**

5 The Notice requests comments on several issues relating  
6 to exclusive contracts. See Paragraph 28 of the Notice.

7 First, WJB believes that the term "exclusive contract"  
8 should be defined broadly. WJB believes that if an affiliated  
9 vendor and an unaffiliated vendor are each offered contracts, but  
10 the unaffiliated version contains significant restrictions not  
11 found in the affiliated version, the affiliated vendor, in effect,  
12 has an exclusive contract. Thus, an exclusive contract can exist,  
13 even if the same services are offered to other parties.

14 The Notice also asks what showing should be required to  
15 establish that an exclusive contract has been entered into. See  
16 Paragraph 33 of the Notice. Again, an unaffiliated vendor will  
17 probably not have access to the documentary evidence needed to  
18 conclusively establish the existence of an exclusive contract.  
19 Thus, the required showing should be minimal, with the burden of  
20 disproving a violation placed on the vendor, who is the only party  
21 privy to the relevant information.

22 WJB disagrees with the preliminary conclusion reached in  
23 the Notice that a showing of harm is required to establish a  
24 violation under Section 628. See Paragraph 34 to the Notice.  
25 Again, Section 628(b) requires only a showing of an "unfair method  
26 of competition" or an "unfair or deceptive act or practice" which

1 has the "purpose" or the "effect" of hindering a programmer. Thus,  
2 if the intent or motivation (the "purpose") is to hinder, a  
3 violation has occurred.

4  
5 **F. Enforcement Issues**

6 WJB applauds the Commission in seeking to expedite claims  
7 under Section 628. See Paragraph 39 of the Notice. However, it is  
8 concerned by several matters relating to the manner in which the  
9 Notice proposes to adjudicate such claims.

10 First and foremost, a complainant probably can never make  
11 a prima facie showing of discrimination. See Paragraph 40 of the  
12 Notice. Only the vendor in question will have knowledge of all of  
13 the relevant terms of each agreement. Thus, a complainant should  
14 only be required to establish a reasonable basis for believing that  
15 discrimination has occurred. By necessity, the burden of  
16 disproving discrimination should rest with the vendor, the only  
17 party privy to the relevant information.

18 The Notice also asks whether the level of penetration  
19 among programmers using similar technologies should provide a  
20 presumption as to whether prohibited conduct has occurred. For  
21 example, if an MMDS operator were to allege unfair behavior by a  
22 vendor, would the experience of other MMDS operators elsewhere in  
23 the country be relevant to its claim? Certainly, if few other MMDS  
24 programmers were able to purchase from the vendor, this fact would  
25 indicate discrimination. On the other hand, the opposite is not  
26 always true. It may be that a particular vendor is affiliated with

1 or favors the cable company in a particular market and, for that  
2 reason, discriminates against the MMDS operator in that market.  
3 This conduct should be prohibited, regardless of how the vendor  
4 treats other MMDS operators. Thus, establishing a presumption  
5 based on penetration levels may be unwise.

### 6 7 **III. PROGRAM CARRIAGE AGREEMENT ISSUES**

8 The Notice also solicits comments regarding Section 12 of  
9 the 1992 Cable Act. This provision adds a new Section 616 to the  
10 Communications Act of 1934, which addresses regulation of carriage  
11 agreements between programmers and vendors. It is especially  
12 designed to restrict certain activities of programmers with respect  
13 to vendors.

14 The Notice asks for comment as to whether Section 616,  
15 when read in conjunction with Section 628, prohibits exclusive  
16 contracts. The Notice points out that Section 628(c) only refers  
17 to exclusive contracts in the case of affiliated programmers and  
18 vendors. However, as WJB has previously noted, Section 628(c)  
19 should not be read as limiting the scope of Section 628; this  
20 subsection only identifies specific and "minimum" conduct for which  
21 regulations are to be promulgated. Instead, WJB believes that a  
22 fair reading of Section 628(b) prohibits all practices that  
23 constitute "unfair methods of competition" or are "unfair or  
24 deceptive" and have the purpose of hindering the activities of a  
25 programmer.

1           Section 616(a)(3) prohibits a programmer from unduly  
2   influencing the decisions of unaffiliated vendors. The Notice asks  
3   for comment on this provision. See Paragraph 57 of the Notice.  
4   Again, it is important to recognize that the cable industry is  
5   dominated by a few large companies who own a large percentage of  
6   the systems nationwide . These companies have acquired the market  
7   power, through their size and monopoly status, to dictate the terms  
8   of carriage agreements. Clearly, they can influence the decisions  
9   of unaffiliated vendors.

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12   **RESPECTFULLY SUBMITTED** this 25th day of January, 1993.

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15           **WJB-TV Limited Partnership**

16   BY: Kenneth E. Hall  
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